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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

EDWARD MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF

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ARGUMENT

I

THIS COURT SHOULD DECIDE PETITIONER'S CASE ON ITS MERITS.

This Court has granted *certiorari* in this case to decide two important constitutional questions: whether a defendant's right to an adequate mental evaluation to explore evidence relevant to criminal culpability or mitigation of a death sentence can be conditioned on wholesale forfeiture of his Fifth Amendment rights; and whether a constitutional defect in a capital sentencing proceeding should be regarded as harmless simply because it does not taint every aggravating circumstance. If these issues are decided in Petitioner's favor, his death sentence must be set aside. Nonetheless, relying on *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), Respondent urges this Court to ignore Petitioner's claim, and to allow Virginia to execute him, simply because the Virginia courts have ruled that the claim was not raised by Petitioner's counsel on direct appeal.

The Fourth Circuit addressed the merits of Petitioner's claim; this Court should do so as well. The facts pertinent to the procedural default issue are these:

—December 1, 1975—The Virginia Supreme Court decided *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*, 425 U.S. 994 (1976). In *Gibson*, the Virginia Supreme Court, while recognizing that "authorities are divided upon the subject," *id.* at 414, held that the prosecution could use the defendant's statements to a psychiatrist during a pretrial forensic evaluation to prove his guilt without abridging the Fifth Amendment.[1]

—May 23, 1977—Michael Smith committed the capital offense for which he has been convicted and sentenced to death.

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[1] Petitioner's trial counsel, David Pugh, testified that he was aware of the holding in *Gibson* v. *Commonwealth*, although he was not aware of the case by name. App. 134.

—July 1, 1977—Virginia's new capital punishment statute, *Va. Code Ann.* §§ 18.2-31 and 19.2-264.2 *et seq.* (1977 Cum. Supp.), became effective.

—November 30, 1977—Petitioner was sentenced to death.

—March 10, 1978—Counsel submitted assignments of error to the Virginia Supreme Court as part of his mandatory appeal. Mr. Pugh did not assign the admission of Dr. Pile's testimony as error because "we did not feel that Virginia case law would support our position at that particular time." App. 142-143. He did not research the federal law, and is not aware that anyone else researched the federal law relating to the issue.

—May 10, 1978—Counsel submitted the Opening Brief in the Virginia Supreme Court. A Brief Amicus Curiae was also submitted in support of Petitioner, by the Post-Conviction Assistance Project of the University of Virginia School of Law. The Amicus Brief addressed the Fifth Amendment implications of psychiatric testimony in capital cases and called the court's attention to the issues raised by the use of Dr. Pile's testimony at trial.

—June 19, 1978—The Fourth Circuit issued its opinion in *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), repudiating *Gibson* v. *Commonwealth*.

—August, 1978—*Smith* v. *Commonwealth* was argued before the Virginia Supreme Court.

—October 6, 1978—*Smith* v. *Commonwealth* was decided. 219 Va. 455, 248 S.E.2d 135 (1978). The Virginia Supreme Court took note of the issues raised by the Amicus Brief, but refused to consider any error not assigned by Smith's counsel, including the error at issue in this case. 219 Va. at 460, 248 S.E.2d at 139 n.1, citing Rule 5:21 of the Rules of the Supreme Court (now Rule 5:25).[2]

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[2] Rule 5:21 then provided:

Error will not be sustained to any ruling below unless the

If counsel had researched the federal law at the time that he filed his assignments of error, it is inconceivable that he would have concluded that the claim was without merit or that he would have failed to raise it. As the Fourth Circuit noted in *Gibson* v. *Zahradnick*, the question presented in *Gibson* had been "substantially answered" by its decision in *United States* v. *Albright*, 388 F.2d 719 (4th Cir. 1968), and "at least 7 other United States Courts of Appeals have since indicated agreement with [the] holding" in *Albright*. 581 F.2d at 78-79. See also the cases cited in Petitioner's Brief 20-21 n.12. In addition, two federal court decisions squarely on point, *Collins* v. *Auger*, 428 F.Supp. 1079 (S.D. Iowa 1977) and *Smith* v. *Estelle*, 445 F.Supp. 647 (N.D.Tex. 1977), had been decided and summarized in the Criminal Law Reporter within the year prior to the filing of the Assignments of Error,[3] and the Fifth and Sixth Amendment implications of pretrial mental evaluations had also been the subject of extensive commentary in the legal literature.[4]

> objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned [in the assignments of error under Rule 5:20] will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of the decision below.

There is no procedure for filing supplemental assignments of error or in some other way bringing up before court an issue raised at trial but not included in the assignments of error.

[3] The District Court decision in *Collins* v. *Auger* had been summarized at 21 Crim.L.Rptr. 2072 (April 20, 1977), and the District Court decision in *Smith* v. *Estelle* had been summarized at 22 Crim.L.Rptr. 2370 (Feb. 1, 1978).

[4] See, e.g., Allis, "Limitations on Prosecution Discovery of the Defense Case in the Federal Courts: The Shield of Confidentiality," 50 *So. Cal. L. Rev.* 461 (1977); Note, "Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards," 51 *N.Y.U.L. Rev.* 409 (1976); Aaronson, "Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Exams," 20 *Stan. L. Rev.* 55 (1973); Lefelt, "Pretrial Mental Exams: Compelled Cooperation and the Fifth Amendment," 10 *Am. Crim. L. Rev.* 431 (1972).

This Court's decision in *Wainwright* v. *Sykes* to apply the "cause" and "prejudice" standard of *Francis* v. *Henderson*, 425 U.S. 536 (1976), to the failure to object to an error at trial does not govern the case in which the error was preserved at trial, but not on appeal.

> Whether the *Francis* rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day.

Sykes, *supra*, 433 U.S. at 88 n.12. This Court's subsequent decisions have focused on the particularly compelling reasons for enforcing a contemporaneous objection rule at trial, *see Engle* v. *Isaac*, 456 U.S. 107, 126-129 (1982), or have involved a failure to comply with North Carolina's unusual requirements concerning the manner in which objections to the instructions must be preserved. *Reed* v. *Ross*, ___ U.S. ___, 82 L.Ed.2d 1, 9-10 n.5 (1984). This court's last clear word on appellate default came in *Kaufman* v. *United States*, 394 U.S. 217 (1969), applying the deliberate bypass standard of *Fay* v. *Noia*, 372 U.S. 391 (1963). The Circuits have split on whether the "cause and prejudice" formula applies to defaults on appeal,[5] and, if it

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[5] The Tenth Circuit has held that in cases of defaults of issues on appeal, the deliberate bypass standard applies. *See Holcomb* v. *Murphy*, 701 F.2d 1307 (10th Cir. 1983); cf. *Rinehart* v. *Brewer*, 561 F.2d 126 (8th Cir. 1977). The Seventh Circuit has adopted the cause and prejudice standard, in part because of its uncertainty about *Kaufman's* continuing vitality. *Spurlark* v. *Wolff*, 683 F.2d 216 (7th Cir. 1982). Other Circuits, without as much elaboration as the Seventh and Tenth, have adopted the cause and prejudice standard for cases involving issues defaulted on appeal. *See e.g.*, *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc*, 754 F.2d 520, *cert. granted sub nom. Sielaff* v. *Carrier*, ___ U.S. ___, 87 L.Ed.2d 649 (1985).

does, whether the "cause" where there has been a default at trial is different from "cause" in a case of appellate default.[6]

This Court need not resolve those questions to decide Petitioner's case. Even if the Court were to assume that the *Sykes* formula applies, it should rule that, under the unique circumstances of this case, the Fourth Circuit correctly decided to reach the merits of Petitioner's claim, notwithstanding the failure of his counsel to raise the claim on direct appeal.

A.

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE FOURTH CIRCUIT CORRECTLY DECIDED TO REACH THE MERITS OF PETITIONER'S CONSTITUTIONAL CLAIM.

This is a proper case for the federal courts to exercise their "equitable discretion" to "look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated." *Reed* v. *Ross*, 82 L.Ed.2d at 10. In this case, the state's attenuated interest in the " integrity of its rules and proceedings and the finality of its judgments," *id.* at 11, must yield to "Congress' expressed interest in providing a federal forum for the vindication of the

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[6] Several post-*Engle* cases have held that "cause" for an attorney's failure to raise an issue on direct appeal may be established even if the attorney's mistake is not attributable to ineffectiveness of counsel of Sixth Amendment proportions. *See Carrier* v. *Hutto*, *supra*; *Clay* v. *Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 433 n.4 (7th Cir. 1984); *Gray* v. *Greer*, 778 F.2d 350 (7th Cir. 1985); cf. *Gibson* v. *Spaulding*, 703 F.2d 362 (9th Cir. 1983). Typically, in these cases the formulation of "cause" permits federal review if the default of an issue resulted from attorney ignorance or inadvertence. In contrast, other cases have expressly held that ineffectiveness sufficient to violate the Sixth Amendment must be shown to establish cause. *See, e.g., Cantone* v. *Superintendent, N.Y. Correctional Facility*, 759 F.2d 207, 218 (2d Cir. 1985).

constitutional rights of state prisoners." *Id.* Five factors support this conclusion.

1. Under The Peculiar Facts Of This Case, Manifest Injustice Would Occur If Petitioner Were to Be Executed Because His Attorneys Failed to Preserve Their Timely Objection To Dr. Pile's Testimony.

Had the same issue arisen in a case in which the Assignments of Error were to be filed 6 months later, after *Gibson* v. *Zahradnick* was decided on June 19, 1978, it is likely that virtually every attorney would have assigned the error and would have briefed it fully to the Virginia Supreme Court. Likewise, had the same claim arisen before *Gibson* v. *Commonwealth* was decided on December 1, 1975, it is likely that many Virginia lawyers would have raised the issue on appeal.

2. Informed Appellate Counsel Would Not Have Abandoned The Issue.

The overwhelming weight of federal case law, available upon even meager research, showed that *Gibson* v. *Commonwealth* was wrongly decided. Publications such as the Criminal Law Reporter had reported such recent decisions, and in fact the Virginia Supreme Court decision in *Gibson* had indicated that the authorities were split.[7]

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[7] We have suggested below that counsel was ineffective in failing to preserve the error, and that such ineffective assistance constitutes "cause" for the federal courts to consider the issue. See 433 U.S. at 96 (Stevens, J., concurring). Although this Court did not grant *certiorari* on our claim that counsel was so ineffective as to be an independent Sixth Amendment grounds of relief, that should not bar the consideration of the competence of counsel in determining whether this issue should be addressed on the merits.

In *Sielaff* v. *Carrier, cert. granted*, ____ U.S. ____, 87 L.Ed.2d 649 (1985), this Court is considering whether the ineffectiveness of counsel sufficient to be a Sixth Amendment violation is conceptually distinct from the ineffective assistance of counsel necessary to be

3. This Issue Was Presented To, And Decided By, Judge Carneal In The State Habeas Proceeding.

In his Findings of Fact and Conclusions of Law, Judge Carneal observed that "Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made during a pretrial psychiatric examination." App. 144-145. After reviewing the facts, Judge Carneal "turn[ed] to the case law discussed by petitioner in support of the first claim" and discussed "two recent decisions dealing with the issue raised," *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), and *Smith* v. *Estelle*, 602 F.2d 694 (5th Cir. 1979). He then stated: "*Focusing on the merits of the first claim*, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal." [Emphasis added.] App. 146-147. He distinguished *Gibson* v. *Zahradnick* because it dealt with a determination of guilt rather than capital sentencing, and distinguished *Smith* v. *Estelle* because it relied on a "waiver" theory. Judge Carneal's conclusion that Petitioner's claim was *without merit* provided an essential link in his reasoning on the issue of ineffective assistance of counsel, and leads to the implication that, had he thought the issue had merit, he would have found that counsel's failure to raise the issue on appeal constituted ineffective assistance. The Virginia Supreme Court affirmed Judge Carneal's ruling, finding no reversible error.

4. This Is A Death Penalty Case.

It is important to remember that this is a death penalty case not only because of the obviously higher stakes involved, and not only because of the overriding concern for reliability in all

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"cause" under *Wainwright* v. *Sykes*. Because we suggest that they are conceptually distinct issues, the failure of this Court to grant *certiorari* on the independent Sixth Amendment claim does not bar us from discussing ineffective assistance as a rebuttal to Respondent's procedural argument.

capital cases,[8] *see Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976), but also because this Court has consistently placed its faith in searching state appellate scrutiny of death cases.

Ever since *Gregg* v. *Georgia*, 428 U.S. 153 (1976), this Court has relied upon the state appellate courts to search thoroughly for errors, and to correct them. See, e.g., *Zant* v. *Stephens*, 462 U.S. 862, 890 (1983):

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.

This Court noted: "the Georgia Supreme Court conducts an independent review of the propriety of the sentence even when the defendant has not specifically raised objections at trial." *Id.* at 879 n.19.[9] While this Court has never held that particular appellate procedure is constitutionally mandated in capital

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[8] Many commentators have taken the position that procedural defaults in state courts should not bar federal review of any claim that would invalidate a death sentence, at least in the absence of a showing that the petitioner himself deliberately bypassed the state process. Catz, "Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception," 18 *U.C. Davis L. Rev.* 1177 (1935); Batey, "Federal Habeas Corpus and the Death Penalty: 'Finality with a Capital F,'" 36 *U. Fla. L. Rev.* 252 (1984).

[9] The Georgia Supreme Court has interpreted OCGA § 17-10-35(c)(1) as requiring consideration of errors that might otherwise be deemed to have been waived for failure to raise at trial. *Hance* v. *State*, ____ Ga. ____, 332 S.E.2d 287 (1985); *Castell* v. *State*, 250 Ga. 776, 778, 301 S.E.2d 234 (1983). The Virginia death penalty statute was modeled on the Georgia statute, and both the Georgia statute and the appellate review conducted under that statute have been repeatedly praised and relied upon by this Court. That appellate review includes the realization that errors not otherwise preserved may nonetheless be circumstances of "passion" and "prejudice" in the imposition of the death sentence.

cases, this Court has clearly indicated its preference for full and careful appellate review of death sentences.[10]

This court need not hold that a state appellate court must make an independent review of claims not raised on appeal or at trial, but surely a state appellate court should consider issues timely raised at trial and presented to it on appeal.

5. The Important Interests That Support Strict Enforcement Of The Contemporaneous Objection Rule Are Not Present In This Case.

In *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982), this Court discussed the social costs of a grant of a writ of habeas corpus, noting that the costs

> are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional

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[10] The Virginia Supreme Court has taken an extremely narrow view of its mandatory appellate jurisdiction in death cases. *Va. Code Ann.* § 17-110.1 (C)(1977 Cum. Supp.) states, in part:

> In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate . . .

In *Fitzgerald* v. *Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), Fitzgerald assigned as error the excessiveness or disproportionality of his sentence, though the issue was neither briefed nor argued (normally grounds for a finding of procedural default). The Virginia Supreme Court held that, the procedural default notwithstanding, they were required to consider and determine the question of disproportionality of the sentence.

However, in *Quintana* v. *Commonwealth*, 224 Va. 127, 148, 295 S.E.2d 643 (1982), the Court rejected the argument that *Va. Code Ann.* § 17-110.1 requires consideration of specific errors not preserved at the sentencing phase of trial. Justice Poff, dissenting in part, argued that the Virginia statute requires the court to consider errors at the sentencing phase, whether or not properly preserved at trial. 224 Va. at 152-153.

> claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials . . . The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules.

In this case, the trial court was afforded the opportunity to "correct the defect and avoid problematic retrials," and the Virginia Supreme Court was offered a chance, which it eschewed, to "avoid federal intrusion." Furthermore, in *Engle* v. *Isaac*, the claims had not been taken through state habeas proceedings, as this case was. Here, the Virginia courts were given the opportunity in habeas to correct the defect without federal intrusion, and the denial of habeas relief was appealed to the Virginia Supreme Court, which was again given the chance to "mend its fences," a chance that it again eschewed.

We do not contend that appellate defaults are never to be given weight;[11] certainly if there is any indication that the default was the product of sandbagging[12] or of an informed tactical decision, the federal courts need not grant relief. Nor need this Court hold that all appellate defaults due to ignorance or inadvertence of counsel must be overlooked in order to grant relief to Petitioner. However, this Court must recognize that the state's interests in enforcing its procedural rules "pale beside the need to remedy a constitutional violation," *Engle* v. *Isaac*, 456 U.S. at 129 n.34, in a death penalty case in which the

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[11] Of course, the Virginia Supreme Court has an interest in enforcing its procedural rules, though the interest in enforcement merely for the sake of docket control alone is weak when it is not supported by broader policy considerations such as those which undeniably accompany enforcement of the contemporaneous objection rule.

[12] While "sandbagging" may be a possibility with a trial default, it is virtually inconceivable as an explanation for appellate default. No advantage could have been gained by withholding a good claim from the appeal of right to the Virginia Supreme Court in the hope of improving Smith's chances later in a discretionary appeal.

issue was presented to and decided by the trial court, brought to the attention of the state appellate court through an Amicus brief, and then immediately made the subject of full exposition in a state habeas proceeding. The state's interests in having its Supreme Court decide the question in October, 1978, rather than in the State habeas petition filed seven months later, is negligible.

B.

APPELLATE DEFAULT OF A CONSTITUTIONAL CLAIM RAISED AT TRIAL SHOULD NOT FORECLOSE FEDERAL REVIEW OF THE CLAIM IF THE PETITIONER SHOWS THAT THE DEFAULT WAS DUE TO HIS ATTORNEY'S INADVERTENCE OR FAILURE TO RECOGNIZE THE MERIT OF THE CLAIM.

Petitioner has argued that this Court should reach the merits of his claim, as did the Fourth Circuit, because of the unique facts of this case. This Court can do so without making new law on procedural default. However, if the Court disagrees with this assessment of Petitioner's case, or believes that guidance is needed by the lower courts, it should hold that federal review is permitted if a habeas petitioner shows that the appellate default was due to his attorney's inadvertence or failure to recognize the merit of the claim.[13]

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[13] The Fourth and Seventh Circuits have held that inadvertence or ignorance constitutes "cause" in cases where the issue was defaulted on direct appeal. *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc*, 754 F.2d 520, *cert. granted sub nom. Sielaff* v. *Carrier*, 105 S.Ct. 3523 (1985); *Gray* v. *Greer*, 778 F.2d 350 (7th Cir. 1985). In addition, the Sixth and Ninth Circuits seem to regard inadvertence or ignorance as "cause" for trial defaults as well as appellate defaults, whether or not counsel's error amounts to a Sixth Amendment violation. *Hockenbury* v. *Sowders*, 718 F.2d 155 (6th Cir. 1983); *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978); *Gibson* v. *Spaulding*, 665 F.2d 863 (9th Cir. 1981); *Garrison* v. *McCarthy*, 653 F.2d 374 (9th Cir.

Under this standard, review would be foreclosed if the defendant or his counsel deliberately tried to evade the state factfinding processes or to delay adjudication of the claim in order to secure a later tactical advantage. Federal review would be presumptively foreclosed if counsel made a tactical judgment that omitting the claim would enhance the likelihood of a successful appeal. In such cases, the client is properly bound by the judgments of his lawyer as long as the attorney provided reasonably competent representation. *See Evitts* v. *Lucey*, ___ U.S. ___, 83 L.Ed.2d 821 (1985); *cf. Washington* v. *Strickland*, ___ U.S. ___, 80 L.Ed.2d 674 (1984).

Federal review should *not* be foreclosed, however, if the petitioner proves that omission of the claim was *not* attributable to informed professional judgment. If the habeas petitioner proves that counsel overlooked the claim or dropped it because he believed, due to inadequate research, that it had no merit, federal review should be permitted, whether or not the attorney's error was so serious as to constitute ineffective assistance of counsel as an independent constitutional violation.

In *Reed* v. *Ross* this Court held that "cause" would be found in the

> failure of counsel to raise a constitutional issue reasonably unknown to him . . . If counsel has no reasonable basis upon which to formulate a constitutional question . . . it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.

1981).

Decisions in the Second and Eighth Circuits have announced or implied that an attorney error in failing to raise an issue does *not* constitute "cause" unless it amounts to a Sixth Amendment violation. *Cantone* v. *Superintendent*, 759 F.2d 207 (2d Cir. 1985); *Tsirizotakis* v. *LeFevre*, 736 F.2d 57 (2d Cir. 1984); *Huckaby* v. *Lockhart*, ___ F.2d ___ (No. 85-1508) (8th Cir. Nov. 26, 1985); *cf. Johnson* v. *Wainwright*, 778 F.2d 623 (11th Cir. 1985).

82 L.Ed.2d at 14. The same reasoning is applicable to cases, such as Petitioner's, in which counsel is *proven* to have been unaware of the existence of a constitutional claim which he fails to raise on appeal. In such cases, the default is attributable to ignorance, not to "strategic motives of any sort." Moreover, to rule that ignorance due to the novelty of an unanticipated claim constitutes "cause" for an appellate default, while ignorance due to counsel's defective (or non-existent) research does not, would be illogical and unfair.

In *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), this Court emphasized that counsel was necessary on appeal because of the need for "the superior ability of counsel in the examination into the record, research of the law, and marshalling of arguments," *quoting Douglas* v. *California*, 372 U.S. 353, 358 (1963). Appellate counsel is expected to "research . . . the law" to make "reasonable professional judgments" about which issues to raise on appeal. While holding that counsel has no constitutional duty to raise every colorable claim suggested by his client, this Court implied that counsel has provided constitutionally adequate assistance if he has exercised "reasonable professional judgment" in deciding which issues to raise. That professional judgment can be reasonable, however, only if counsel has done his "research of the law" in choosing the issues for appeal.

By permitting federal review of claims forfeited on direct appeal due to attorney error, the Court would not increase the burden of habeas litigation in the federal courts. Even under the strict approach proposed by Petitioner Sielaff and the Solicitor General in *Carrier*, a habeas petitioner would be entitled to federal review if he could demonstrate that the attorney's error was of sufficient magnitude to establish ineffective assistance of counsel. Although the number of federal habeas corpus petitions *granted* may be greater if the burden of proof on "cause" is easier to meet, the number of federal habeas cases *brought* will not likely vary much.

Nor will the nature of the inquiry change. A finding of ineffective assistance of counsel requires a ruling on both the

competence and the prejudice prongs of the test. *Washington* v. *Strickland*, ____ U.S. ____, 80 L.Ed.2d 674 (1984). A habeas court hearing a charge of ineffective assistance of counsel on appeal would look at the competence prong and ask whether reasonably competent counsel would have appealed the issue—in other words, was it a good issue? In the prejudice inquiry the state habeas court asks whether the defendant would have been entitled to a new trial had the issue been appealed—in other words, was it a good issue? In the typical case, a state habeas court will consider the merits of the claim through the ineffective assistance inquiry, within months of a state appellate court's refusal to consider the merits on direct appeal.

Rigid adherence to appellate default rules in federal habeas litigation would have an undesirable effect on the state's appellate process. If it were clear that a claim that was raised at trial but defaulted on direct appeal was foreclosed from federal review—no matter what the explanation—it can be confidently predicted that counsel will appeal every nonfrivolous claim even if it is not fully researched or briefed. The Court noted in *Reed* v. *Ross*, 82 L.Ed.2d at 14-15, that the refusal of the federal habeas courts to consider "novel" claims would "encourage" defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition. This is undesirable because it diffuses the attention of the appellate court. The problem is even greater if the attorney is led to appeal every issue raised at trial simply because he thinks unidentified cases or authorities might support it.

Given the requirement that state remedies be exhausted, and given the fact that state post-conviction proceedings are usually brought very promptly when the defendant has an execution date set, the interests of finality, comity and federalism that are strong factors in trial default cases carry much less weight in appellate default cases.

II.

THE PROSECUTION CANNOT MAKE AFFIRMATIVE USE OF STATEMENTS MADE BY A DEFENDANT DURING A MENTAL EVALUATION CONDUCTED TO HELP DEFENSE COUNSEL EXPLORE EVIDENCE RELEVANT TO CRIMINAL CULPABILITY AND TO MITIGATION OF A DEATH SENTENCE.

A.

Warning A Capital Defendant That Statements Made During A Defense-Requested Mental Evaluation Can Be Used Against Him Would Highlight Rather Than Eliminate The Conflict Between His Right To An Adequate Evaluation And His Fifth Amendment Interests.

Respondent argues, relying on *Estelle* v. *Smith*, 451 U.S. 454 (1981), that a capital defendant's Fifth Amendment rights are adequately protected if the defendant is warned before a mental examination of the use to which his statements may be put. Brief on Behalf of Respondent 13-16. Such a warning may be sufficient to avoid the surprise in *Estelle* v. *Smith*, but it is clearly insufficient in the more usual case, in which the defense is seeking a mental evaluation to explore the availability of claims relevant to criminal culpability and in mitigation of a death sentence. In those cases, warnings would only reduce the likelihood of full disclosure, compromising the reliability of the evaluation. The defendant cannot be required to surrender his privilege against self-incrimination as the price for obtaining an adequate mental evaluation. No legitimate state interest justifies putting the defendant to such an unfair choice.

Suppose, as an example, that a Defendant was only permitted to speak to his attorney in the presence of a police officer. Would such a requirement be rendered any less unconstitutional by giving the defendant a warning that what he might say during the interview could be used against him? Similarly, where a psychiatrist has been appointed to assist the defense, warning the defendant that his statements can be used against

him would merely highlight the defendant's dilemma rather than eliminate it.

B.

The Impermissibility Of Dr. Pile's Testimony Is Reinforced By, But Is Not Dependent On, This Court's Decision In *Ake* v. *Oklahoma*.

Three amicus briefs filed in support of Petitioner's claim in this Court[14] have urged the Court to recognize that confidentiality in a forensic evaluation is necessary to give the defendant a fair opportunity to explore and present claims based on his mental condition and to safeguard the internal strategic precesses of the defense. Accordingly, they have urged this Court to rule that evidence derived from a defense-requested mental evaluation is insulated from disclosure to and use by the prosecution by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.[15] This reason-

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[14] Brief of the American Psychiatric Association and the American Academy of Psychiatry and the Law as Amici Curiae in Support of Petitioner; Brief for Amicus Curiae American Psychological Association in Support of Petitioner; Motion for Leave to File and Brief for the New Jersey Department of the Public Advocate as Amicus Curiae in Support of Petitioner.

[15] This position is also endorsed by the American Bar Association in its Criminal Justice Mental Health Standards approved by the House of Delegates in August, 1984. Standard 7-3.3(b) provides, in relevant part:

> Whenever a mental health or mental retardation professional conducts an evaluation of defendant's mental condition upon the request or motion of the defense, all disclosures made by defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege. As to that evaluation only, the privilege is waived to the extent that discovery is permitted by Standard 7-3.8(b), if:
>
> (i) Defendant gives notice pursuant to Standard 7-6.3 of an intention:
>
> (A) To raise an issue concerning defendant's mental condition at the time of the alleged crime, and
>
> (B) To introduce the testimony of the mental health or

ing is strongly supported by this Court's decision in *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed.2d 53 (1985), which strongly implies that expert psychiatric assistance must be provided within the framework of the attorney-client relationship. If this is the nature of the assistance guaranteed by *Ake*, it clearly follows that the defendant's disclosures to the expert, and the expert's opinions based on these disclosures, are insulated from discovery by the prosecution (absent a waiver of this protection under state notice and discovery rules) and, even after discovery, are insulated from affirmative prosecutorial use.

However, this Court need not hold that expert assistance must be provided within the framework of the attorney-client relationship in order to rule in Petitioner's favor.[16] If the Court

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mental retardation professional who conducted the evaluation to support the defense claim on this issue; or,

(ii) Defendant calls another mental health or mental retardation professional as an expert witness concerning defendant's mental condition at the time of the alleged crime, and the prosecution establishes, to the court's satisfaction, that in bad faith the defendant secured evaluations by all available qualified mental health or mental retardation professionals in the area thereby depriving the prosecution of the opportunity to obtain an adequate evaluation.

This standard does not preclude a mental health or mental retardation professional from disclosing the fact that the professional evaluated a named person upon defense request.

[16] Under a narrower reading of *Ake*, a "neutral" evaluation, conducted for the court outside the framework of the attorney-client relationship, might satisfy the defendant's constitutional right to an adequate mental evaluation. See 84 L.Ed.2d at 72 (Rehnquist, J., dissenting). If the defendant is not *constitutionally* entitled to an evaluation under the umbrella of the attorney-client relationship, and is entitled only to a "neutral" evaluation by an expert independent of the prosecution, a ban on prosecutorial use of information derived from the evaluation could not be based on the Sixth Amendment right to the effective assistance of counsel. However, affirmative prosecutorial use of disclosures made to a "neutral" expert would still be forbidden by the Fifth Amendment and the Due Process Clause

is reluctant to endorse the propositions urged by Amici, it should not hesitate to rule that the prosecution's affirmative use of Dr. Pile's testimony violated the Fifth Amendment and the Due Process Clause under the reasoning of the Fourth Circuit in *Gibson* v. *Zahradnick* or the parallel reasoning of the Eighth Circuit in *Collins* v. *Auger*, 577 F.2d 1107 (8th Cir. 1978). The inadmissibility of Dr. Pile's testimony on this ground was clearly established in the federal courts at the time of Petitioner's trial.

C.

Petitioner Has Not Changed His Position On The Fifth Amendment Argument.

Respondent argues, at pages 16-17 of its Brief, that Petitioner has shifted his position in this litigation. According to Respondent, Petitioner had previously objected to Dr. Pile's testimony only on the ground that Dr. Pile did not warn him about the consequences of his statements. That is wrong. Since the state habeas petition was filed in 1979, Petitioner has consistently argued that affirmative prosecutorial use of evidence derived from a pretrial mental evaluation must be prohibited to accommodate a defendant's right to an adequate mental evaluation with his privilege against self-incrimination.[17]

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because such a ban is necessary to avoid putting the defendant to an unfair choice between his right to an adequate evaluation and his privilege against self-incrimination.

[17] See, for example the Memorandum of Law filed on November 19, 1979 in the Circuit Court for the City of Williamsburg and the County of James City (pages 5-10) and the Petition for Appeal filed on July 16, 1980 in the Virginia Supreme Court (pages 14-21). Petitioner's substantive theory is clearly reflected in Judge Carneal's Findings of Fact and Conclusions of Law (App. 144-48). Petitioner has consistently argued that a defendant does not "waive" his privilege against self-incrimination by requesting an examination or speaking to the examiner; he "waives" his Fifth Amendment interests only by putting his mental condition in issue and by introducing expert testimony to

D.

The Court Should Not Hesitate To Resolve The Constitutional Issue Presented By Dr. Pile's Testimony In The Present Posture Of The Case.

Respondent has urged the Court to refrain from deciding whether Dr. Pile's testimony was constitutionally admissible on the ground that the issue has not been decided on its merits by the lower courts. This position is a little peculiar in light of the Commonwealth's persistent effort to dissuade every court, including this Court, from deciding Petitioner's claim on its merits. Moreover, the state habeas court actually addressed the merits of Petitioner's claim in the course of ruling that it had been forfeited due to procedural default. Although neither the District Court nor the Court of Appeals squarely confronted the issue, the governing law in the Fourth Circuit is not in doubt; that court's decision in *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), upon which Petitioner has relied throughout these proceedings, clearly controls this case.[18] Under these circumstances, this Court should not hesitate to resolve the issue upon which it has already granted *certiorari*.[19]

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support his claim.

Of course, Petitioner has argued that even if a waiver of the defendant's Fifth Amendment of interests can be effected by speaking to the examiner, such a waiver occurs only if the examiner gives the defendant explicit warnings at the outset of the evaluation, which Dr. Pile did not do. See Petitioner's Brief 22 n.14. However, this has never been Petitioner's primary argument.

[18] Although the holding in *Gibson* only bars affirmative prosecutorial use of evidence derived from a mental evaluation to prove the defendant's guilt, the Commonwealth has conceded that a capital sentencing proceeding is the "functional equivalent of a guilt trial, at least so far as the Fifth Amendment privilege is concerned." Respondent's Brief at page 22.

[19] Even if the Court is reluctant to decide the issue in the present posture of the case, it should not dismiss the writ as improvidently granted, as suggested by Respondent (Respondent's Brief at page 19, n.14). Instead, the Court should remand the case to the Fourth Circuit with directions to decide Petitioner's claim on its merits.

CONCLUSION

Respondent does not want this Court to reach the merits of the questions on which this Court granted certiorari. In a case such as this one where the substantive issue was raised at trial, not preserved on appeal, but then nonetheless presented to the appellate court by an Amicus Brief, the state's interest in the integrity of its procedural rules does not outweigh Petitioner's interest and the state's interest in not executing someone who has been deprived of a fair trial.

The State cannot condition exercise of the right to an adequate mental evaluation upon a surrender of the Fifth Amendment privilege against self-incrimination. The interviews and work product of an expert appointed at the request of the defense, ostensibly to assist the defense, cannot be subject to affirmative use by the prosecution to prove the statutory predicate for the death sentence.

Michael Smith asks this Court to order that his death sentence be vacated, and that he be resentenced or that his sentence be commuted to life imprisonment, as the state courts may deem appropriate. In the alternative, if this Court shares Respondent's concern that the issues have not been decided on their merits by a lower court, Petitioner asks this Court to remand to the Fourth Circuit with instructions to consider the merits of the issue.

Respectfully submitted,

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